Fundamental Rights Officer’s Observations to return operations conducted in the 1st Semester of 2019

1 January - 30 June 2019

Background and overview of activities

In accordance with Article 28 (8) of the European Border and Coast Guard Regulation (hereafter referred to as ‘the Regulation’), the Fundamental Rights Officer (FRO) shall provide observations on fundamental rights covering all return operations. Her observations are attached to the Executive Director’s semi-annual evaluation report to the Management Board. The reporting period is therefore adapted to the submission of the evaluation report by the Executive Director, covering the 1st semester of 2019. FRO Observations will be shared with the Member States’ Direct Contact Points on Returns, Member States’ return monitoring bodies and monitors from the pool of forced return monitors (hereinafter referred to as ‘the pool’).

The pool, as foreseen in Article 29 of the Regulation, became fully operational on 7 January 2017. As set forth by Article 28 (3) of the Regulation, at least one forced-return monitor from the pool or from the national monitoring system of the participating Member State, shall be present throughout the entire return operation from the pre-departure phase until the hand-over of the returnees in the country of return, with the aim of ensuring that the fundamental rights safeguards are in place. The mechanism acts de facto as a subsidiary guarantee to the Member States’ (hereinafter referred to as ‘MSs’) obligation to provide an effective forced-return monitoring system, as per Article 8(6) of the Return Directive 2008/115/EC. Prior to the enactment of the Regulation, the Agency and the FRO have constantly encouraged MSs to enhance the systematic use of their national monitoring bodies in all return operations. The strengthening of national monitoring mechanisms would have a direct positive impact on the overall capacity to monitor return operations, both at national and European level.

As indicated in the Frontex Evaluation Report 1st semester 2019, Member States are continuously encouraged to use the Frontex pool to deploy more monitors to national return operations. Likewise, Member States are invited to increase their contributions to the pool of forced-return monitors in order to facilitate effective deployment of forced-return monitors on request of the Member States.

As foreseen in Article 36 (4) of the Regulation, the forced-return monitors shall be provided with a specific training covering all the aspects regarding fundamental rights, especially concerning the use of force and means of restraints, and access to international protection. In the period from 1 January to 30 June 2019, FRO team was actively engaged in the following activities supporting return matters:

a. Familiarisation visits in Frontex HQs, aimed at introducing the enhanced role of the Frontex European Centre for Returns (ECRet) in the area of return operations, including fundamental rights elements, for representatives of:
   - Republic of Moldova, 05 February;
   - Republic of Ghana/Consular Workshop for Consular Officials accredited in the EU, 26 February;
   - Republic of Ivory Coast/Consular Workshop for Consular Officials accredited in the EU, 07 March;
   - Republic of Belarus, 13 March;
   - Socialist Republic of Vietnam, 11 April;

b. Contribution to the selection of monitors on a monthly basis;

c. Cross-unit meetings on a monthly basis with the European Centre for Returns;
d. Forced Return Monitoring Project (FReM III) activities organized by ICMPD.
   - FReM III events:
     1. 1st PSG Meeting, 12 February 2019, Vienna, Austria
     2. 1st training for forced-return monitors, 18-22 March 2019, Oslo, Norway
     3. National Training on Return and Forced-Return Monitoring in Cyprus on 9-10 May 2019
     5. FReM III 1st annual lessons learned meeting, 25-26 June 2019, Bratislava
   - Contribution to FReM documents:
     1. Assessment of the functioning of the Pool
     2. Questionnaire for forced-return monitors nominated/about to be nominated to the Pool
     3. Revision of the reporting template for monitors of the pool

e. Intervention on the planned return of 3 families (including with ECTHR interim measures) by JRO from Hungary to Afghanistan on 7 May 2019;

f. 52nd meeting with Direct Contact Points in Return Matters (DCP) combined with 11th Pre-Return Activities Network meeting (PRAN), 22 May 2019;

g. Contribution to PAD requests related to return matters.

Observations of the Fundamental Rights Officer

In the present Observations FRO provides an overview of the findings and conclusions from the 94 reports submitted by the forced-return monitors activated from the pool. FRO also highlights examples of good practices for the consideration of both the Management Board and the Executive Director as well as recommendations to act upon in order to ensure fundamental rights compliance during the Agency’s return activities.

According to the information provided in the Frontex Evaluation Report on Return Operations in the 1st Semester of 2019, a total of 163 return operations were co-ordinated by Frontex. At least one monitor was present on board of 137 out of all 163 Frontex-coordinated return operations by charter flights (over 84%).

Notably, during the reporting period, all of the Agency’s supported Collecting Return Operations had on-board a forced-return monitor from the pool or from a national monitoring system of the participating MSs through the entire return operation, as foreseen in Article 28 (3) of the Regulation. Likewise, all Joint Return Operations were monitored. As regards National Return Operations, 32 out of 58 had a monitor on board.

Within the reporting period, in the context of one return operation, a complaint was submitted to Frontex regarding alleged violation of fundamental rights of returnees (type of allegation: violation of the principle of non-refoulement) in May 2019 (reported in MB June 2019) and the complaint is handled within FRO.

In the reporting period, FRO notes that there were no Serious Incident Reports related to alleged violations of fundamental rights and officially submitted by participants in the operations. However, there have been a number of issues reported by the monitors, which triggered follow up and are presented in this report. In this context, FRO suggests that FRO Observations are used for training purposes of escorts and escort leaders to raise awareness of all the aspects which can negatively impact fundamental rights.

1. Preparation of return operations

As provided in Article 4 of the Code of Conduct for Return Operations (ROs) and Return Interventions (RIs) (hereinafter "the Frontex CoC") coordinated or organised by Frontex, the Agency shall ensure that ROs and RIs are to be conducted in a humane manner and in compliance with fundamental rights. In order to achieve this goal, there is a need to provide sufficient and adequate safeguards already in the preparation phase of the RO and/or RI. The comments by the forced-return monitors related to the preparation of the operation that should be taken into consideration are the following:
In accordance with some monitoring reports received, relevant information was missing in the Frontex Implementation Plan, i.a.: a. information about interpreters was not or not properly provided (mentioned the non-availability of an interpreter, while in the course of the operational activities, the interpreter was present); b. lack of information about potential agreement with a non-EU country on the specific conditions of returnees acceptance, which resulted in non-acceptance of one returnee with mental health condition already in the course of the hand-over procedure. In one operation, the monitor reported incomplete information available in advance to the operation.

In this context, FRO emphasizes that the Implementation Plan should be distributed in advance, at least 2-3 days ahead of the return operation with all necessary information. Likewise, information is to be provided to the forced-return monitors prior to the start of the operation, about the number, origin and vulnerabilities and/or special considerations of returnees. FRO underlines that in a detailed briefing, the escort leader should inform the participants of return operations about the list of returnees, seating plan, embarkation and in-flight procedures, movements on board, access to the toilets, hand-over of personal belongings, as well as security, including use of coercive measures. Furthermore, FRO recommends to provide the monitor with an estimated time and location for the briefing as soon as contact is established. This would allow the monitor to choose suitable flights or other transport so as to arrive on time for the briefing and the rest of the pre-departure phase.

As regards the presence of interpreters, one monitor underlined that interpreters should be available during the operation for effective communication with the returnees and it is not the role of the monitors to replace them. Another monitor found important to apply certain criteria in the course of the selection procedure of the interpreters (emphasis should be put on the sufficient knowledge of the language of the returnees and representatives of the OMS).

In accordance with some reports received, there is a need to increase the number of female forced-return escorts, to ensure adequate escorting in operations when women and families with children are to be returned. The presence of a female officer in this situation is a basic standard. In two reported cases, female escorts were not enough in numbers by comparison to the amount of women and children to be returned. In one case only two female escorts among 41 escorts in total devoted their tasks to 40 returnees out of 14 were female returnees. In another operation, there were only 3 female escorts dedicated for 12 children and 2 infants. FRO shares the view of the monitors that the presence of female officers should be ensured throughout all phases of the implementation of an operation involving women and children as to ensure the rights to privacy, integrity and human dignity and to ensure that potential gender specific needs are identified and addressed. According to Frontex standards, a female returnee should be escorted by at least one female escort.

In accordance with the Guideline 18 of the Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, “Member States are encouraged to ensure that at least one escort should be of the same sex as the returnee”. This may facilitate the communication between the returnee and the escort and, in certain situation, it may help preserve the dignity and intimacy of the returnee. The Frontex Implementation Plan also provides that “escorts of the same gender as the one of the returnee are advised to jam the toilet door open and to observe the returnee”. As provided in the Guide for Joint Return Operations by Air co-ordinated by Frontex, the gender and age of the returnees, as well as the experience and the language skills of the forced-return escorts should be taken into account when assigning them to the return operation.

In some operations, the lack of labelling of luggage of returnees was observed, which can create some tensions during the procedure of hand-over and should be avoided. The monitors highlighted the importance of the belongings of the returnees to be properly marked with numbers and their names in order to prevent their potential lost. In addition, FRO recommends luggage labelling to be arranged according to the Frontex Implementation Plan and luggage check to be organised in the presence of the returnee.

In one case, the return of a returnee was stopped at the last minute after he was already on board. In this context, the reporting monitor stresses that such ad-hoc situations should not happen after the embarkation procedure as the decision to embark should be final.
Further recommendations by monitors:
- Personal belongings: suggestion to provide returnees with the opportunity to collect their belongings, requesting them to sign a document to prove that they have been given such a possibility and to have written evidence on their consent or refusal to collect their personal belongings.
- Improvement of spatial conditions was recommended in the terminal at the airport, in particular related to the area designated for smokers and the room for the medical staff. In another report the monitor suggested to provide with sufficient seats in order to ensure that all persons who are to be returned are able to sit during the waiting time prior to boarding in the aircraft.
- List of passengers to be checked by escorts well in advance in order to be better prepared while distributing the seats on board.

2. Communication and right to information

With regards to Article 6 of the Frontex CoC, the competent authorities of the MSs as well as the other participants shall seek cooperation with each person being returned, at all stages of the return operation. Following the observations received, there are still some issues that should be taken into consideration to improve communication between returnees and participants of return operation, as highlighted by the forced-return monitors, notably:

- In several operations, no interpreters were present during the flight or the hand-over in the non-EU country. It was noticed that the interpreter should be available at the airport from the beginning of the operation to prevent any potential conflict based on the language barriers between returnees and escorts.
- Need was also expressed to provide clear information on participants’ roles to medical personnel as well as to guarantee the presence of interpreters and monitors in the PMS delegation. This would constitute a good practice.
- With reference to the above, FRO recommends an increased involvement of interpreters throughout all phases of forced-return operations to be carried out. This de-escalating preventive measure is likely to result in the returnees’ better understanding of the procedures thus lowering tensions and possible aggressive behaviours.
- FRO further suggests ECRET to take steps to gradually report about the exact number of interpreters in return operations in their bi-annual Evaluation Report and emphasizing their presence as a means to enhance cooperation and communication during return operations, depending on the language requirement, when needed. FRO recommends that depending on the assessment of escorts and returnees needs and language skills, the MS should provide with the suitable interpreters. During the hand-over of personal belongings to the returnees, an interpreter and medical personnel should be present to avoid potential misunderstandings.

3. Medical issues

The presence of medical staff (doctor, nurse or paramedic) should be ensured in all operations coordinated or organised by Frontex pursuant to Article 14 of the Frontex CoC. It remains as one of the key aspect in the work of all participants in return to ensure that fundamental rights are being respected:

- A number of monitors identified a need for a paramedic to be present during the pre-departure phase in the detention centre. In this regard, FRO recommends all relevant medical information to be shared with the doctor in charge during the operation. The doctor should examine the returnees at the pre-departure phase.
- As in previous reports, it appears that some MS national authorities did not provide with “fit-to-travel” forms certifying that there was no obstacle to travel for the returnees. In this regard, one reported that out-dated “fit-to-travel” forms were provided shortly before the start of the operation. It is suggested by several monitors to ensure that the “fit-to-travel” form is issued and that not only but also that the medical examinations are carried out shortly before the removal (in detention centres). As already raised in the FRO Observations on return operations in previous semesters, national authorities are to set up the rules on issuance of fit-to-fly certificate, ideally as a mandatory requirement, in line with the Council of Europe standards.
Information to Monitors
In a reasonable time prior to the Return Operation, the authorities of the MS are required to provide for a medical examination of a returnee, subject to their agreement, where they have a known medical condition or where medical treatment is required. Medical procedures should be carried out in a manner that observes the principles of medical confidentiality and dignity.

4. Right to privacy and property of persons returned

In the 1st semester of 2019, forced-return monitors made observations according to which violation of the right to privacy and property of the persons pending removal had taken place:

- As already highlighted in previous semesters, valuable personal belongings should not be placed in the baggage hold of the aircraft. They should be stored in the sealed envelope or a plastic bag and marked with the name of returnee, and kept by the respective escort. FRO would recommend to strengthen luggage handling procedures in the upcoming revision of the Guide on JROs currently ongoing within the Agency.
- With reference to privacy and data protection, some monitors observed that medical data was disclosed to participants other than medical staff. More attention should be given to the type of data to be included in the documentation submitted to the national authorities once handed over to them.

5. Treatment of vulnerable groups

In the preparation and throughout the implementation of operations, special consideration should be given to vulnerable persons such as children, disabled persons, elderly people, pregnant women, etc.

Some observations and suggestions provided by the forced-return monitors include:

- Lack of setting up a kids' play area at the terminal to let children play with toys and games. The establishment of a mobile playroom for children in the return terminal of the airport should be arranged for return operations, in particular when a high number of children is to be returned.
- One report mentioned that the same place was designated for smoking area and waiting room with the presence of children, which is neither in line with the Article 24 of the Charter nor with the UN Convention on the Rights of the Child to enjoy the highest attainable standard of health.
- Special care for families with children and items for babies and young children to be made available (diapers, milk, baby food) based on the needs;
- Individual treatment to be guaranteed for families with children, also enabling families with vulnerable persons, including children/ to board the aircraft separately and be seated separately from other returnees.
- In one return flight an unaccompanied minor was to be returned. Such return is not in accordance with Frontex general rules on conducting return as well as in contradiction to the Annex I of the Frontex Implementation Plan; the procedure was in accordance with national law, but in contradiction with Frontex procedures. The return was stopped at the last minute after the unaccompanied minor was already on board. Upon such incidents, already underlined in previous FRO Observations, a specific safeguard tool on unaccompanied minors was introduced into FAR system. FRO appreciates the development in this regard and, at the same time, recommends to continue a strong policy on raising awareness on the protection of the best interests of the child taking into account that unaccompanied minors are not allowed on Frontex coordinated and organized return operations.
- One monitor remarked that a person waiting for return wanted to return together with his relative by voluntary return. This option should be checked and arranged before the actual day of forced return.
- In one flight a person informed the monitor that he claimed for asylum and was waiting for the final decision in this regard. The monitor did not receive any further feedback from the Authorities on the case.
- One monitor noticed the presence of a potential victim of human trafficking among the returnees and informed the authorities respectively recommending that more attention is to be given in such circumstances.
6. Use of force and means of restraint

Article 7 of the Frontex CoC reflects the international and European standards on the use of force and means of restraint, which can be applied only in accordance to necessity, legality and proportionality principles, or in response to an immediate and serious risk. Any decision to use coercive measures has to be based on an individual risk assessment. The use of force requires the application of specific techniques employed by trained staff, who is also submitted to periodical refresher training sessions to prevent potential risks to the physical safety and dignity of returnees.

- In several reported cases, the applied means of restraints were not considered necessary, legal or proportionate as defined in the Frontex Implementation Plan but were allowed in the respective Member State(s).
- In some cases, the monitors expressed doubts whether the means of restraints were used in accordance with the principles of necessity and proportionality, and were reasonable in the current situation. This is the case for instance concerning the decision taken to uphold means of restraint in the course of flight, even though the returnees remain calm. In one case, for security and safety reasons, up to 10 escorts were holding one returnee being in body-cuffs. This measure has always to be based on a solid individual risk assessment which existed.
- As a general note, the list of authorised forbidden restraints is to be provided to the monitor. More attention should be paid in this regard to Article 7.4 of the Frontex CoC referring to the handling and early distribution of the list of authorised restraints.
- As regards the issue of providing with proper facilities, in one operation it was suggested to keep restrained returnees in a separate waiting area at the airport, in particular in order to separate them from families with children. In another flight, further discussion was also advisable on the usage of wheelchair for transportation in case of already restrained and not cooperative returnee as an alternative of not carrying her/him by several escort officers.
- A delicate security situation occurred during one return operation when the returnee took the gun of ground staff/police and threatened them. The ground staff took control over the situation after some minutes. To avoid such dangerous incidents, it is advised that proper briefings among the ground staff/police are being held and eventually that weapons are not being carried during return activities.

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<th>Information to Monitors</th>
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<td>A list of authorised restraints and equipment permitted during the joint return operation that was decided by the organising Member State together with Frontex in accordance with its national legislation, international law and EU law, in particular the Charter of Fundamental Rights is to be provided. However, no participating Member State should use coercive measures that its legislation does not allow, even if those measures are accepted by the organising Member State for that particular operation.</td>
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7. Basic needs

- Few monitoring reports referred to the need of providing better quality and sufficient amount of catering for returnees. Other reports suggest that returnees should be provided with food during waiting time at the airport, in particular for long return operations. In one case, there was shortage of food for the returnees at the airport. Likewise, in case of longer journeys from the detention centres to the airport, the packed food should be prepared in advance. In this context, FRO underlines the importance to guarantee sufficient amount of food to be available, in particular for long return operations.

8. Hand-over procedure

- In several monitoring reports it was recommended that an interpreter or an escort speaking the respective language should be available to avoid misunderstandings during the hand-over procedure.
• In one case the monitor identified a need for a better organisation of the hand-over procedure with the authorities of the countries of return. In this regard, FRO recommends a proper preparation of documents and adequate personnel for the hand-over procedure.

9. Complaints mechanism

• Some monitoring reports mentioned that there were no Frontex complaint forms available during the return operation. Information material to be provided to returnees on the Frontex complaints mechanism was generally missing. In this regard, FRO recommends to guarantee the availability of and access to information as well as to complaint forms in operational areas, if possible in the language spoken by the returnee. Furthermore, FRO addresses the importance to inform participants of the operations about the complaints mechanism and the right to submit a complaint.

Information to Monitors
Article 72 of the EBCG Regulation establishes a complaints mechanism to monitor and ensure the respect for fundamental rights in all Frontex activities. Any person who is directly affected by alleged fundamental rights violations during operational activities by staff involved in Frontex activities may submit a complaint in writing to the Frontex. The Fundamental Rights Officer is responsible for handling complaints received by Frontex in accordance with the right to good administration. For forced-return monitors, it is important to note whether forms are available during the forced-return operation coordinated or financed by Frontex and that in case of any complaint arising during the operation, the Frontex representative or the EL can provide relevant information and the complaint form.

10. Collecting Return Operations (CRO)

• Generally, with regards to CRO, it is recommended that Frontex vests are used and more training to be provided on the lavatory procedure for the escorts from non-EU countries deployed in CRO.

• A video recording of the handover procedure was announced by the non-EU country national institutions but due to late notification was not accepted. Despite the refusal, at arrival, a media team was present. Some of the returnees as well as escorts felt very uncomfortable, disagreed with the presence of media recording and were reluctant to disembark upon arrival. Pursuant to Article 13 of the Frontex CoC, any form of recording during a return operation is possible only when specifically agreed between relevant MS, Frontex and the company operating the means of transport, and in compliance with applicable data protection legislation.

In this regard, FRO emphasized that the information regarding recording of the return operation should be requested and agreed in advance to the participants and returnees. Likewise, escorts and returnees should be informed in advance about planned media coverage in all cases. FRO notes that this situation could be clearly seen as an alleged fundamental rights violation, namely an interference with the right to privacy of the returnees and participants (Article 7 of the Charter of Fundamental Rights of the EU), their right to dignity (Article 1 of the Charter of Fundamental Rights of the EU), their right to integrity (Article 3 of the Charter of Fundamental Rights of the EU), the right to protect of personal data (Article 8 of the Charter of Fundamental Rights of the EU), and should be avoided and discussed before preparation of return flights. Furthermore, FRO also recommends that in case of allowed video recording the image of returnees and participants should be blanked out in order to protect their fundamental rights, unless they agree otherwise.

• Presence of a non-EU country national monitor is encouraged to cooperate with the MS or forced return monitor from the pool, as an additional safeguard to ensure the follow up of possible incidents with the non-EU country authorities.
11. Further observations from monitors and FRO

- Several monitoring bodies continued to address and ask about the possibility to deploy two monitors from the pool to operations where there are many returnees or longer flight is foreseen. FRO continues to recommend in some operations at least two monitors to be present depending on the duration of operation, its complexity, number of returnees and the risk profile of the returnees.
- Further discussion was also advisable on the obligation to notify the date of the expected operation to returnees in due time. It should be ensured that all persons to be returned are aware of this circumstance at least in advance, so that they have the time to take the necessary steps, not only to collect their belongings, but also to alert their relatives in their country of departure and their country of destination about their return and travel information.
- The launching and keeping conversations between escort officers and the returnees who they accompany was considered a very positive way to handle potential stressful situations.
- The presence of social workers and medical doctor during the pre-departure phase at the airport is considered very useful.

In conclusion, FRO will follow up on the observations and address concerns raised by following ways:

- bring the relevant issues and present recommendations to ECET/ participants during return operations and also provide regular feedback to the monitor institutions;
- collect the observations in order to discuss main conclusions in different fora, including during the training for escort leaders and forced-return monitors;
- systematically gather information and identify challenges regarding particular areas of return operations for discussions with relevant MS;

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